FOR ARGUMENT.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-529

WES WISE, et al., *Petitioners,*

v.

ALBERT L. LIPSCOMB, et al., and
ADELFA B. CALLEJO, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS CALLEJO, et al.

VILMA S. MARTINEZ
MORRIS J. BALLER
LINDA HANTEN
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
28 Geary Street, 6th Floor
San Francisco, California 94108

JOAQUIN G. AVILA
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
517 Petroleum Commerce Building
201 N. St. Mary's St.
San Antonio, Texas 78205

GEORGE SOLARES
3700 McKinney, Suite 230
Dallas, Texas 75204

Attorneys for Respondents Callejo, et al.

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BRIEF FOR RESPONDENTS CALLEJO, et al.

QUESTIONS PRESENTED

1. Did the district court err in accepting petitioners' suggestion for a hybrid plan as a remedy for their unconstitutional at-large election scheme, despite this Court's strong preference for single-member district remedial plans?

2. Was the district court correct in finding such unusual circumstances in this case as to justify implementation of a hybrid plan including three at-large districts?

STATEMENT OF THE CASE

In their briefs, neither the City petitioners nor the black respondents fully discuss the position of Mexican Americans in this litigation and in the political life of Dallas. Because that position is crucial to resolution of questions presented here, respondents Callejo, et al. here supplement the Statement of the Case found in the other parties' briefs.

A. Proceedings Below.

1. This case proceeded to trial on the Second Amended Complaint (A. 5-11), in which several Mexican Americans joined the black petitioners as plaintiffs. The Mexican American plaintiffs were dismissed for failure to comply with discovery, 399 F. Supp. at 784 (A. 122). Trial began on July 15, 1974; the next day, the present Mexican American respondents (hereinafter "intervenors") filed their application to

intervene, 399 F. Supp. at 784 (A. 123). On December 9, 1974, the district court denied intervention, but reserved for intervenors the right to participate in any proceedings to determine relief (A. 26-28). It also certified a class of black residents of Dallas, represented by the black respondents (hereinafter "plaintiffs") (A. 28).

After trial on the merits, the district court on January 17, 1975 made an oral finding that the Dallas at-large system was unconstitutional, in that it impermissibly diluted black voting strength, 399 F. Supp. at 791 (A. 134-35). The court then invited the Dallas City Council, in virtually mandatory terms, to take advantage of "an opportunity to submit to this Court a plan for re-districting which is not in conflict with the Constitution."[1] It formalized its finding and order in an opinion entered March 25, 1975, 399 F. Supp. 782 (A. 121 et seq.).

2. The Mexican American intervenors were permitted a limited partici-

[1]Transcript of Judge's Remarks on Announcing Ruling (January 17, 1975), p. 4; see also id., pp. 22-24; 399 F. Supp. at 791 (A. 135).

pation at the remedy stage. Id. at 791 (A. 135). On January 24, 1975, the City defendants proposed a plan consisting of three at-large seats and eight single-member districts (A. 30). The City plan was not a redistricting ordinance but merely a resolution of intention passed by the City Council on January 20, 1975 (A. 188-89), just three days after the court's oral decision (A. 45, A. 3). Defendants acknowledged that they submitted the plan in direct response to the court's preliminary oral findings of dilution. (A. 44, 45, 61, 135).[2] The black plaintiffs proposed two plans: one provided for eleven single-member districts, with the eleven council members then to elect a mayor; the other for ten single-member districts and one mayor elected at-large, 399 F. Supp. at 691 (A. 136). The district court limited the intervenors' role at the remedy hearing to eliciting "...testimony as to the effect that the city's plan and the

[2]The City Council in directing the city staff to formulate a plan did not instruct the staff to take into account racial or ethnic criteria (A. 29, 60). Thus, a districting plan which provided Mexican Americans greater access to the City Council was not even considered (A. 37-38).

plaintiffs' two plans would have on the Mexican American voting population of Dallas." Id. at 791 (A. 136). Intervenors did not therefore present their own plans. Prior to the hearing, representatives from the Mexican American community had unsuccessfully sought to present other alternatives to the City's proposed districting plan to the City Council (A. 43-44, 63). The Council merely directed them to the federal court.[3]

3. The court in its March 25, 1975 opinion approved the eight-three plan over objections of both plaintiffs and intervenors, 399 F. Supp. 791-98 (A. 135-47). Plaintiffs and intervenors appealed the remedy; defendants did not appeal the finding of unconstitutionality of their original at-large plan. On May 9, 1977, the Court of Appeals reversed and remanded with instructions requiring a single-member district plan such as those proposed by plaintiffs, 551 F.2d 1043 (A. 167-77). Justice Powell stayed that

[3]In a similar fashion, the Council would not afford the black community an opportunity to present their single-member district plans (A. 49).

judgment on August 30, 1977, 54 L.Ed.2d 41 (1977) (A. 181-87). Certiorari was granted on January 9, 1978.

B. At-Large Voting and Mexican Americans.

Mexican Americans comprise approximately 8%-10% of the population of Dallas, according to the 1970 census. Blacks comprise 25%, and the remaining 65% are Anglo. Although they comprise about 35% of Dallas' total population, before institution of this suit racial minorities were locked out of effective participation in the at-large process for electing the City Council. Under the district court's hybrid remedy, black participation remains restricted, while Mexican Americans remain entirely excluded.

The record shows that Mexican Americans in Dallas are a cognizable and victimized minority group. The district court also recognized that discrimination against Mexican Americans had included some degree of restriction of their voting rights, but not so great a degree as to render that restriction an unconstitutional

dilution.[4] The district court's findings with respect to the impact of at-large voting specifically on Mexican Americans are similarly ambivalent, finding some handicaps and some advantages.[5] There is no dispute, however, that racial bloc voting is a political reality in Dallas, and it affects Mexican American candidates, 399 F. Supp. at 793-94 (A. 140), see A. 43. Another harsh reality of at-large campaigning in a city the size of Dallas is its extremely high cost--a serious obstacle for Mexican Americans (A. 75, 67).

Under the at-large election scheme, only two Mexican Americans have ever been elected to the Dallas City Council (A. 110). Both enjoyed the support of Dallas'

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[4] "The Court finds that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution...The restriction of access which is present for Mexican-Americans is of a smiliar nature to that this Court found to exist for the black voters, but it differs..." 399 F. Supp. at 793 (A. 138), see also A. 72-73.

[5] "At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks. At the same time, however, it is clear that at-large voting offers features [continued next page]

most powerful slating group, see 399 F. Supp. at 786-87 (A. 126-28), the Citizens Charter Association (C.C.A.) (A. 110, 41, 73). Numerous witnesses testified that Mexican American candidates in at-large elections had little or no hope of winning unless they obtained C.C.A. endorsement (A. 42, 48-49, 55, 66). As a result, Mexican American City Council representation in Dallas depends on the grace of C.C.A. This dependency relationship frustrates Chicano political aspirations and means that any successful Mexican American aspirant would have to be responsive to the Anglo-dominated C.C.A., rather than to his popular constituency (A. 65).[6]

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which allow greater participation in the political processes within Dallas for Mexican-American voters, that would be unavailable in a single-member district voting plan." 399 F. Supp. at 794 (A. 140).

[6]As to blacks, the district court found this phenomenon "[a]nother shadow of dilution," since "[m]eaningful participation in the political process must not be a function of grace, but rather is a matter of right", 399 F. Supp. at 790 (A. 134).

SUMMARY OF ARGUMENT

I.A. This Court has consistently held that in formulating a remedy for at-large election schemes which unconstitutionally dilute minority voting rights, single-member districts are strongly preferred. Connor v. Johnson, 402 U.S. 690 (1971). Petitioners ask the Court to establish an exception to this remedial rule whenever a state or local political entity submits a redistricting plan which is not itself unconstitutional. The Court should reject that position and should hold that once a district court has made a finding that the at-large scheme is unconstitutional, the rule of Connor v. Johnson should guide the court in devising a complete remedy, regardless of whether the court draws its own remedial plan or acts on suggestions by the political entity. (pp. 12-17)

I.B. The remedial plan submitted by Dallas, containing three at-large seats, is a court-ordered plan. It was not enacted in the normal course of legislation, but was hastily submitted after the district court made its finding of unconstitutionality and declared its intention

to grant relief. The Dallas plan was not and could not have been enacted at all. Rather, the Dallas City Council merely invited the district court to order its proposal into effect. Dallas made no effort to submit its plan for Section 5 preclearance, 42 U.S.C. §1973c, which was necessary unless the plan was deemed court-ordered. Thus the usual rule requiring single-member districts in court-ordered plans is applicable. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). (pp. 17-28)

II. In formulating a remedial plan, the district court was bound to utilize single-member districts unless exceptional circumstances justified a hybrid plan including at-large seats. No such circumstances existed here.(pp. 29-31)

A. The district court's reliance on the purported benefits of at-large voting to Mexican Americans is misplaced. The hybrid plan handicaps Mexican Americans as well as blacks, and perpetuates the dilution of their vote. Minority voters would be better off under the plans submitted by the black plaintiffs. The

district court's remedial plan not only fails to enhance minority political access; it also perpetuates the unconstitutional features of the original at-large election scheme.(pp. 32-40)

B. The alleged need for city-wide perspective is not a self-evident justification for remedial use of at-large districts. Dallas made no special showing here as to why the goal of having city-wide perspective on the Council requires retention of three at-large districts. On this record, the district court was not justified in departing from the rule of preference for single-member districts. (pp. 40-46)

ARGUMENT

I. THIS COURT'S STRONG PREFERENCE FOR SINGLE-MEMBER DISTRICT REMEDIAL PLANS TO REPLACE UNCONSTITUTIONAL AT-LARGE ELECTION SCHEMES APPLIES TO THIS CASE.

A. The Preference For Single-Member Districts May Not Be Put Aside Merely Because A State Legislative Body Suggests Another Remedy.

Petitioners rely heavily on the distinction between "court-ordered" (or "court-initiated") and "State-initiated" reapportionment plans (Pet. Br. 10-11). Defining a State-initiated plan very broadly to include one submitted "within a reasonable time" after a judicial finding that the prior apportionment was unconstitutional, petitioners argue that such a State-submitted remedial plan must be approved, provided only that it meet minimum constitutional standards (Pet. Br. 10).[7]

[7]The district court apparently followed a like standard. In opening the hearing on a remedy, the court announced that the hearing's purpose was "to determine the constitutionality of the new proposed plan by the City of Dallas" (A. 29).

The rule of law petitioners suggest would eviscerate important remedial principles developed by this Court in a line of decisions descending from Connor v. Johnson, 402 U.S. 690, 692 (1971), to Connor v. Finch, 52 L.Ed.2d 465, 473-74 (1977).[8] Adoption of that rule would as a practical matter nullify the Court's oft-stated preference for use of single-member districts to remedy at-large shcemes which have been held unconstitutional. See cases cited in n. 8, supra. Since district courts initially defer to the subject political entity for submission of proposed redistricting plans, a rule requiring approval of state-submitted hybrid plans so long as they are not themselves unconstitutional would readily permit circumvention of the preference for single-member districts.[9]

[8]See also, Connor v. Williams, 404 U.S. 549, 551 (1972); Mahan v. Howell, 410 U.S. 315, 333 (1973); East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1976).

[9]The distinction between court-ordered and court-approved plans in the sense proposed by petitioners would also undercut the goal of population equality between districts with little more than de minimis variation, Connor v. Finch, supra, 52 L.Ed.2d at 477. [continued next page]

Instead of focusing on the highly artificial technicality of whether a redistricting plan was "approved" or "ordered" by the district court, or whether the State or the court "initiated" a plan, the courts should determine whether the proposed plan was submitted as the result of a judicial finding of unconstitutionality. When a redistricting scheme containing at-large seats is adopted by the political entity pursuant to its normal legislative functions and not pursuant to a finding of unconstitutionality, than the plan need only meet the Equal Protection standards of the Fourteenth Amendment. White v. Regester, 412 U.S. 755 (1973).[10] A finding of unconstitutional

Under a court-approved plan, a political entity could submit an acceptable reapportionment plan with a total deviation of 16%, Mahan v. Howell, supra; while a court-ordered plan with the same deviation would be unacceptable, Chapman v. Meier, 420 U.S. 1 (1975). A political entity could therefore bypass the federal common law on reapportionment remedies merely by submitting a plan for the district court's approval.

[10]In the case of state-enacted at-large election plans, which are not unconstitutional per se, Whitcomb v. Chavis, 403 U.S. 129 (1973), the plan is valid unless it unconstitutionally dilutes the votes of racial minorities. White v. Regester, supra, 412 U.S. at 765.

dilution, however, requires the district court to adopt a complete remedy, cf. International Salt Co. v. United States, 332 U.S. 392, 401 (1947)' Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), which will rectify the denial of access caused by the at-large election scheme.

Once an at-large election scheme has been declared unconstitutional, the judicial deference incorporated in the presumption that at-large election districting legislation is not unconstitutional per se no longer applies. The only deference which should then be given to the political entity is an opportunity to formulate a redistricting plan which complies with the Court's stated preference for single-member districts unless "insurmountable difficulties",[11] "unique factors",[12] or "special circumstances"[13] dictate otherwise.[14] The availability of a complete remedy for un-

[11]Connor v. Johnson, supra, 402 U.S. at 692.

[12]Mahan v. Howell, supra, 410 U.S. at 333.

[13]East Carroll Parish School Bd. v. Marshall, supra, 424 U.S. at 639.

[14]The drawing of district [continued next page]

constitutional dilution of minority voting rights should not be subjected to a dual standard within the control of the discriminating legislative entity.

A complete remedy to correct the deficiencies of an unconstitutional at-large election scheme requires implementation of a single-member district plan. The remedy will remain incomplete if at-large districts are utilized in correcting the deficiencies caused by an unconstitutional at-large election scheme. The pernicious effects of unconstitutional at-large election voting do not disappear merely because the scheme now incorporates some single-member district seats. The Court's preference for remedial use of single-member districts flows from its recognition of the "practical weaknesses inherent" in at-large election schemes, Chapman v. Meier, supra, 420 U.S. at 15-16. These problems include the difficulty of evaluating multiple candidates, the length and complexity of ballots, and the prevalence of bloc voting which are fostered by at-large

boundary lines to conform to neighborhood or geographical boundaries is an example of a state or local choice to which federal courts should defer, assuming constitutional and remedial sufficiency of the proposals.

districting. Id. Such "weaknesses" are particularly damaging to racial minorities' political aspirations.

For these reasons, the Court should decline to establish a separate, permissive standard for use of at-large districts in remedial plans when the plan is submitted by a political entity which has unconstitutionally diluted minority citizens' voting rights.

B. The Plan Adopted Below Is Court-Ordered, Since Petitioners Submitted It In Response To A Finding of Unconstitutional Dilution Of Voting Rights.

The Court may identify the pertinent distinction as being between "court-ordered" and "state-enacted" plans,[15] as between plans enacted in the normal course of state legislation and those formulated in response to a judicial finding of unconstitutionality, or in some other manner. No such labels should be mechanically applied. However articulated, the crucial inquiry is into the origin of the plan submitted by the Dallas City Council and adopted by

[15] These terms were utilized by Mr. Justice Powell in his grant of a stay herein, 54 L.Ed.2d 41, 44.

the district court. The only fair conclusion of that inquiry here is that the eight/three plan is of the type that we will henceforth denominate for convenience a court-ordered (as opposed to state-enacted and court-approved) plan.

In determining whether a plan is to be designated a court-ordered or court-approved plan, the chief inquiry is whether the political entity enacted the legislative plan on its own authority or if the equitable power of a federal court order was invoked in implementing the legislative plan. See, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The City of Dallas eight/three proposal was nothing more: the legislative authority of the City of Dallas did not even allow the City Council to adopt a redistricting which could then be submitted for court approval.

Dallas is governed by a Home Rule Charter pursuant to the Home Rule Amendment, Article XI, Section 5 of the Texas Constitution. That Charter required elections for City Council on an at-large basis until after entry of the district court's opinion (A. 188). Locally-initiated changes in these charter provisions

could only be made pursuant to the Home Rule Amendment's provision that qualifying cities

> may by a majority vote of qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature...

Article XI, Section 5, Texas Constitution. Furthermore, Vernon's Ann. Civ. Stat. Art. 1165 establishes that a Home Rule City Charter cannot be amended unless a majority of the voters in a Charter Revision Election vote to approve the amendment.[16] In recognition of this limitation on amending the City Charter, Chapters IV and VIII of the Dallas City Charter provide that any amendments must be approved in a special election.[17] Finally, Chapter XXIV, §16 of

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[16] A similar procedure is utilized by towns and villages incorporated pursuant to Vernon's Ann. Civ. Stat. Art. 1133. For those political entities incorporated pursuant to Art. 1133, the charter of the town or village cannot be amended unless the board of aldermen and two-thirds of the voters at a special Charter Revision Election approve the proposed amendment. Vernon's Ann.Civ. Stat. Art. 1153. Thus, the State of Texas has been at pains to remove from municipalities the power to redistrict themselves without advance approval of the electorate.

[17] See also, Vernon's Ann. Civ. Stat. Art. 1170.

the Charter prohibits the city from undertaking any action which would violate state laws or the Texas Constitution. See also, Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641, 644 (Tex. 1975) ("The powers of home rule cities are subject to and may be limited only by their charters or by the Constitution or by general law").

The manner and method of electing members to the Dallas City Council is specified in the City Charter. Thus any change in the procedure for electing council members would necessitate an amendment of the City Charter requiring approval by city voters. When the district court on January 17, 1975 held that the Dallas at-large election scheme was unconstitutional, the court gave the City an opportunity to offer any plans to remedy this constitutional violation. In response, the City Council, by City of Dallas Resolution No. 75-0207, sec. 1 (A. 188), authorized the City Attorney to submit the eight/three plan to the district court (A. 30). The City Resolution could not effectuate a change in the City

Charter.[18] Consequently, prior to submitting the plan to the district court, the plan was merely a proposal, since the Dallas City Council could not reapportion "itself on its own authority,"[19] cf. East Carroll Parish School Board v. Marshall, supra, discussed below. For this reason,

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[18]The district court also recognized the limitations on the City Council to change the City Charter:

> Changes to the voting system necessarily are changes to the Charter and absent a judicial determination of unconstitutionality, such changes can only be effected by a Charter Amendment adopted by the voters.
>
> It is a City Charter provision which is at issue, not a mere ordinance. A majority vote of the registered voters of the City is required to change the Charter. The members of the City Council, cannot, on their own, modify the Charter to alter the voting scheme. Council's role is to propose changes to the Charter by proposed amendment which in turn is approved or rejected by the voters of Dallas.

399 F. Supp. at 800 (A. 150-51).

[19]The City Council in subsequently enacting Ordinance No. 14800 acknowledged this inability to enact redistricting legislation:

> Section 2. As a result of the decision of the United States District Court [continued next page]

the district court ordered that the eight/three plan as had been offered by the City be submitted "in time for the April 1975 city council elections", 399 F. Supp. at 798 (A. 147). The basis for the utilization of the City's eight/three plan was therefore a federal court order, not the City Council Resolution. In fact, the City of Dallas did not hold a Charter Election until April 3, 1976 to determine whether the City electorate would approve the proposed manner for electing council members.[20]

These facts present the same situation

> for the Northern District of Texas in the case of Albert L. Lipscomb, et al. v. Wes Wise, et al., CA-3-4571-E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7, and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7, and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11.

Pet. Br. 4.

[20]The City approved the change and the charter was amended in 1976.

as East Carroll Parish School Board v. Marshall, supra. In East Carroll Parish, the plan was listed as a court-ordered plan because the police jury had no legislative authority to enact a reapportionment. Prior to 1968, applicable Louisiana laws prohibited the implementation of at-large election schemes for police juries. However, in 1968 the state legislature proposed a statute permitting police juries to convert to at-large election schemes. When submitted to the United States Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, an objection issued. This letter of objection rendered the legislative act legally unenforceable.[21] Consequently, the East Carroll police jury lacked legislative authority to convert to an at-large election scheme. This Court discussed the absence of authority in the context of whether the policy jury reapportionment of 1971 had to be submitted pursuant to Section 5:

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[21]See, Connor v. Waller, 421 U.S. 656 (1975); Morris v. Gressette, 53 L.Ed.2d 506, 514 n. 8 (1977); United States v. Board of Commissioners of Sheffield, Alabama, 46 LW 4189, 4196 (1978).

> Had the East Carroll police jury reapportioned itself on its own authority, clearance under Sec. 5 of the Voting Rights Act would clearly have been required. However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation... which permitted police juries and school boards to adopt at-large elections. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under Sec. 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself.

424 U.S. at 638 n. 6 [citations omitted], cited also in Wise v. Lipscomb, 54 L.Ed.2d at 45 n. 2 (1977) (Powell, J., order staying judgment).

Although the district court did not explicitly refer to the eight/three plan as a court-ordered plan, and indeed stated that it had "approved" the plan, 399 F. Supp. at 798 (A. 148), the Court should not be confined by labels in assuring that important principles of voting remedies should be properly implemented. The district court's statement that it "approved" the Dallas plan cannot mask the fact that the court had no valid legislation before it for approval. The district court's

implementation of the City's eight/three plan was--and could only have been--pursuant to a court-ordered plan.

The April 3, 1976 City Charter Election by which Dallas' voters adopted the 8-3 plan (see p. 22, n. 20, supra) cannot retroactively make the 1975 reapportionment effective as a legislative act. Neither the Constitution and laws of Texas nor the Dallas Home Rule Charter authorize giving retroactive effect to charter amendments. To hold the 8-3 plan "court-approved" in these circumstances would in effect give the City Council the power of nunc pro tunc legislation which neither Texas nor Dallas has granted the Council.

The failure of Dallas to submit its eight/three plan for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, is further evidence that the plan could be considered at most a suggestion rather than state-initiated legislation. In the absence of a federal court order implementing the plan, Dallas was required to submit it to the Attorney General of the United States or the District Court for the District of Columbia, for determination that the change does not

have a discriminatory purpose or effect on grounds of race, color, or membership in an applicable language minority group. 42 U.S.C. §1973c.[22] Elections conducted without Section 5 preclearance would have been invalid but for the federal court order.[23] The only exception to this preclearance requirement, which this Court has always strongly enforced,[24] is for "court-ordered plans resulting from equitable jurisdiction over adversary proceedings," East Carroll Parish School Board v. Marshall, supra, 424 U.S. at 638 n. 6; Morris v. Gressette, supra, 53 L.Ed.2d at 514 n. 8 ("a reapportionment scheme...submitted and adopted

[22] In 1975 the Voting Rights Act was extended to cover Texas, and to require preclearance submission of all post-November 1, 1972 changes affecting voting. This Court has in the past year affirmed that Texas jurisdictions are covered, Briscoe v. Bell, 53 L.Ed.2d 439 (1977), and that municipalities like Dallas are subject to Sec. 5 procedures, United States v. Board of Commissioners of Sheffield, Alabama, supra.

[23] See, United States v. Board of Supervisors of Warren County, Miss., 51 L.Ed.2d 106, 110 (1977); Silva v. Fitch, __F. Supp.__(W.D. Tex. No. SA-76-CA-126, 1976) (three-judge court), aff'd 51 L.Ed. 2d 528 (1977).

[24] See, United States v. Board of Commissioners of Sheffield, Alabama, supra, 46 LW 4192-93, and cases therein cited.

pursuant to court order" is not subject to Section 5).

The Voting Rights Act clearly established a heightened standard for review of election law changes, including redistricting, in political jurisdictions which are subject to the preclearance requirements of Section 5.[25] One alternative procedure for assuring review under the heightened standard is the Section 5 mechanism, in which the local jurisdiction must assume the burden of persuasion of the issue of non-discrimination. The reason that procedure does not apply where the voting law change is court-ordered is precisely that the federal courts then have the equitable power and duty to remedy the constitutional violation fully and effectively, not just minimally. See pp. 15-16, supra. To accept the eight/three plan on the basis of its being "court-approved" or "state-initiated" in this case would allow Dallas to avoid Section 5 and at the same time excuse the

[25] See, e.g., Georgia v. United States, 411 U.S. 526 (1973); Beer v. United States, 425 U.S. 130 (1976); United States v. Board of Commissioners of Sheffield, Alabama, supra.

district court from applying the strong preference for single-member districts. Such a holding would give recalcitrant jurisdictions an invitation and road map to perpetuating the denial of political access to racial and ethnic minorities to the greatest extent possible by retaining as many at-large districts as they could.[26]

The Court should hold that the Dallas eight/three plan was court-ordered, and therefore must be reviewed under the single-member district principle established in Connor v. Johnson, supra.[27]

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[26] Illustrative of the consequences of such an approach are the actions of the Waco, Texas Independent School District. After a district court found that the Waco I.S.D. all-at-large election scheme unconstitutionally diluted both black and Mexican American voting rights, __F. Supp.__(W.D. Tex. No. W-74-CA-21, Feb. 27, 1976), Waco I.S.D. proposed a hybrid plan calling for election to four seats by district and three seats at-large. When the district court found the 4-3 plan inadequate to remedy the discrimination, id., Waco I.S.D. made the smallest incremental change possible, submitting a 5-2 plan. The district court accepted this scheme. (The case is now pending on appeal, on the remedy issue, 5th Cir. No. 76-2264.)

[27] In the event the Court finds the district court's eight/three plan exempt from the strong preference for single-member districts, on the grounds that the plan was "state-initiated" or [continued next page]

II. NO SPECIAL CIRCUMSTANCES JUSTIFY USE OF AT-LARGE DISTRICTS IN THE REMEDIAL PLAN FOR DALLAS.

The district court erred in holding that the situation of Mexican American voters in Dallas and the desirability of a city-wide perspective on the City Council constituted special circumstances justifying the implementation of a hybrid eight/three plan. 399 F. Supp. at 792 (A. 137). The record in this case does not require or support any deviation from the usual preference for single-member districts.

This Court has articulated and applied the very heavy burden which a district court has to overcome before departing from the single-member district rule in several slightly different ways. Connor v. Johnson, supra, 402 U.S. at 692, held that legislative single-member districts were to be implemented, "absent insurmountable barriers." The Court reversed a trial court finding that lack of sufficient time

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"court-approved", logic requires that petitioners be directed to seek Section 5 preclearance. Morris v. Gressette, 53 L.Ed.2d at 512 n. 2.

to prepare a single-member district plan before an upcoming primary constituted such a barrier, and found that time pressures imposed by an impending election did not justify departure from the single-member district rule, 402 U.S. at 692. In East Carroll Parish School Board v. Marshall, supra, the Court summarily held that there were no "special circumstances" which required multimember districts.[28] This Court has found reason to allow multimember districts as part of a remedial plan on only one occasion. In Mahan v. Howell, 410 U.S. 315 (1973), the Court approved limited use of a multimember district for Virginia Senate seats upon a finding that the case presented a "singular combination of unique factors," 410 U.S. at 333. The Court allowed use of a three-member district combining three proposed single-member districts which contained significant

[28]The Court so held although the Court of Appeals opinion noted that blacks constituted close to half of the electorate and that three black candidates had run successfully in recent at-large elections. See Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1975) (en banc).

population disparities and assigned military personnel to districts where they did not reside, 410 U.S. at 332.[29] Even in these extreme cases, the imposition of the multimember district was as an interim remedy only, and the Court specifically encouraged Virginia to substitute a constitutionally sound single-member district plan, 410 U.S. at 333. n. 13.

The Fifth Circuit has correctly interpreted these decisions to mean that, "[t]he term, 'special circumstances,' encompasses only the rare, the exceptional, not the usual and diurnal," Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), cert. denied 53 L.Ed.2d 1060 (1977). The evidence relied on by the district court and by petitioners simply does not meet the standards established by this Court for remedial use of at-large districts in a hybrid plan.

[29]The Court referred to "plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible,...and fear that too much delay would have seriously disrupted the Fall 1971 elections." 410 U.S. at 333 [citation omitted].

A. The Hybrid Plan Does Not Enhance Mexican American Voting Rights.

1. The Eight/Three Plan Does Not Benefit Mexican Americans.

Although the district court found no dilution of the Mexican American vote, the court nevertheless recognized the right of Mexican Americans "not to be invidiously excluded from participation in the political life of Dallas." 399 F. Supp. at 793 (A. 139). According to the district court's analysis of Dallas politics, Mexican Americans would benefit from at-large voting. The court somewhat speculatively concluded that an all single-member district plan might tend to decrease their participation in the political process, 399 F. Supp. at 793 (A. 139-40).

Intervenors believe that the district court's analysis reverses the political reality: voting rights of Mexican Americans would be enhanced by implementation of plaintiffs' single-member district plans, and are diluted by at-large districts and the hybrid plan.

Mexican Americans have even less access to the political process implemented

by the district court than they had under the previous all at-large system. Mexican American aspirants for city-wide places would continue to be dependent upon C.C.A. endorsement (A. 36, 73). The eight/three plan therefore inhibits the attainment of Chicano political independence that accompanies enjoyment of an undiluted vote (A. 49, 51, 58). Moreover, although C.C.A. occasionally endorsed a Chicano candidate when there were eleven at-large districts, C.C.A. is unlikely to support a Mexican American for one of the two at-large places available. (A. 71).[30]

Plaintiffs' proposed plans calling for either eleven single-member districts or a ten/one plan with only the mayor elected at-large would provide the Mexican American community with far greater opportunity to make its vote effective. Plaintiffs' expert, Dr. Dan Weiser, testified that under plaintiffs' plan, District 2 would be approximately 31% Mexican American, 35% black, and 34% Anglo, providing

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[30]The third at-large position of mayor is not realistically available to minority candidates in a racially polarized city with only 35% minority population.

some chance for a Chicano to be elected (A. 71-72).[31] Witness Robert Medrano, a Chicano, testified that in 1974, after twice losing at-large races, he won election to the Dallas I.S.D. board from a district virtually identical to the proposed District 2 (A. 83-86). He stated that a similar City Council district would be a very attractive possibility for him, while the eight/three plan would preclude such a race (A. 87, 89).

Elections held under the eight/three plan adopted by the district court bear out the adverse effect of that plan on Chicano political fortunes. In the April 1975 Council election, Pedro Aguirre, a Mexican American incumbent, ran at-large and was defeated by a margin of 65%-35% (A. 154, 159, 162, 164-65).[32] Projections of the same vote show Aguirre obtaining 42.4% and 43.1% of the vote in plaintiffs'

[31]Dr. Weiser also noted that plaintiffs' plan would also establish three districts with black majorities, thereby enhancing the voting strength of the plaintiff class (A. 71).

[32]Two black Council members were as expected elected from the "safe" black districts created in the eight/three plan.

proposed District 2, tabulated as it would be under plaintiffs' two proposed plans (A. 155).[33] Mexican American candidates also failed in the April 1977 general election and the November 1977 special election.[34] Thus, the court's eight/three plan has not permitted any greater degree of direct Mexican American representation and has eliminated what direct representation previously existed. The eight/three plan also gives Mexican Americans less "swing vote" strength than would plaintiffs' plans. In District 2 of the court-adopted plan, Mexican Americans are less numerous than blacks (20% versus 25.9%) and both minorities combined fall short of a population majority, 399 F. Supp. at 795 (A. 143). In plaintiffs' plans, Mexican Americans in coalition

[33]As plaintiffs have previously noted, "This result was achieved without any special efforts that a candidate would normally make within his district when running in a single-member district situation rather than at-large" (A. 155).

[34]Although not reflected in the record made below, it is of public record that in the general election one Mexican American ran at-large and was defeated. In the special election for an at-large seat, two Mexican American candidates ran unsuccessfully.

with either Anglo or black voters could control a majority in District 2, thereby ensuring responsiveness to the Chicano community even if no Chicano candidate ran.

On these facts, the district court's conclusion that the eight/three plan enhanced political access for the Dallas Mexican American community is untenable. The record will not support a finding that the purported benefits of at-large voting for Mexican Americans constitute an unusual circumstance justifying departure from the single-member district rule.

2. The Eight/Three Rule Itself Unconstitutionally Dilutes Minority Voting Rights.

This Court has frequently held that a reapportionment plan, formulated in the context of denial of access of minority groups to the political process, which would perpetuate that denial is itself unconstitutional, White v. Regester, supra, 412 U.S. at 766; Whitcomb v. Chavis, supra, 403 U.S. at 149. See also, Kirksey v. Board of Supervisors of Hinds County, Miss., 554 F.2d 129, 143 (5th Cir. 1977) (en banc), cert. denied 46 USLW 3357 (1977). Since the

hybrid eight/three plan adopted below perpetuates the dilution of black voting strength and actually increases the denial of political access to Mexican Americans, it denies rights guaranteed under the Fourteenth and Fifteenth Amendments.

Both the at-large and single-member aspects of the district court's remedial plan operate to continue this dilution of the black vote in Dallas. The existence of three at-large districts dilutes black voting strength for the same reasons that the all single-member plan did so, see 399 F. Supp. at 790 (A. 133-34). This feature of the plan therefore "will continue in effect an existent denial of access to the minority," Kirksey v. Board of Supervisors of Hinds County, Miss., supra, 554 F.2d at 143. The plan's other eight districts also fail to provide a complete remedy for dilution. While the standards for evaluating dilution have been developed in the context of all multimember schemes, the courts recognize that single-member districts may be drawn in such a way as to deny minorities political access. This may be true, even when the minority group comprises the majority

of the population in some single-member districts. See, Kirksey v. Board of Supervisors, supra, 554 F.2d at 143. Cluster dilution such as that involved in the oversaturation of blacks in two districts and their virtual elimination from the other districts involved in this plan is unconstitutional denial of political access. Burns v. Richardson, 384 U.S. 73, 88 (1966).[35] This conclusion is reinforced by clear record evidence that there were other, clearly non-discriminatory alternatives.[36]

Dilution of Mexican American voting strength by the eight/three plan is even more severe. There is no significant concentration of Mexican Americans in any of the eight single-member districts in the court's plan, nor do Mexican Americans constitute the primary ethnic group in any district. Although Mexican Americans are dispersed throughout Dallas, they are not benefitted by at-large voting. See

[35]District 1 is 73.6% black; District 2 is 87.3% black. The district with the next highest minority concentration is 25.9% black and 20.0% Mexican American. 399 F. Supp. at 795 (A. 143).

[36]See pp. 33-36, supra.

pp. 33-35 , supra. Moreover, the single-member districts proposed in plaintiffs' plans would have provided significantly greater representation and access than the eight/three plan. See pp. 33-34, supra.

This Court's decision in Mahan v. Howell, supra, suggests that the preference for single-member district remedial plans should be overriden only when such a plan would operate unconstitutionally. See 410 U.S. at 331-32; cf. Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied 53 L.Ed.2d 1060 (1977). Here, far from being unconstitutional, the all-single-member plan would avoid the unconstitutional effects of retaining three at-large districts and minimizing minority voting strength in the eight other districts. In terms of racial impact, cf. United Jewish Organizations of Williamsburg v. Carey, 51 L.Ed.2d 229 (1977),[37] the

[37]Petitioners' reliance on United Jewish Organizations v. Carey goes only to meet the rationale of the Fifth Circuit decison herein. It does not meet the arguments respondents rely on here. On the contrary, the Carey decision supports our position. It held that measures to enhance minority political access could be taken into account, in the absence of a finding of unconstitutionality, [continued next page]

district court's plan actually diminishes the access of Mexican Americans, while it fails to assure the access of blacks. For this additional reason it does not pass constitutional muster as a remedy for Dallas' original at-large election scheme.

B. The Alleged Need For At-Large Districts To Provide City-Wide Perspective Is Not Substantiated.

The district court also found the need for a city-wide view on the council to be a special circumstance justifying a departure from the all single-member district preference, 399 F. Supp. at 794 (A. 141). This concern for a city-wide perspective has never been recognized by this court as a per se justification for at-large districts in court-imposed

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when a State enacts a reapportionment plan to seek compliance with Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. 51 L.Ed.2d at 245. It held also that such considerations did not offend the Constitution since they did not imply any "racial slur or stigma," 51 L.Ed.2d at 246.

The basic error committed by the district court was not that it considered the impact of the remedy on Mexican Americans at all, but that it utilized incorrect legal standards--both as to the degree of deference to be accorded to Dallas and as to the determination of "special circumstances" relating to Mexican Americans--in formulating "race-conscious remedies," 51 L.Ed.2d at 249 (Brennan, J., concurring).

remedial plans. It should not be recognized as an unusual circumstance here.

A political entity's desire for district-wide representation on its governing board is a general rather than a special circumstance. In every instance where a governing board is forced to reapportion, it can make an argument that overall perspective is desirable if not absolutely necessary. This Court's decision in East Carroll Parish, supra, and its summary reversal of a decision approving a plan with one at-large district in Wallace v. House, 425 U.S. 947 (1976),[38] indicate that it is

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[38] In Wallace v. House, 515 F.2d 619 (5th Cir. 1975) (en banc), the Fifth Circuit ordered implementation of a hybrid plan to remedy unconstitutional dilution of black voting strength. The one at-large district in the plan was justified in part by reliance on the principle that:

> at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties.

515 F.2d at 633. In summarily reversing, this Court apparently felt that East Carroll Parish, supra, disposed of the Fifth Circuit's justification.

On remand, the Fifth Circuit held that its former holding, which had approved one at-large representative, had to yield to the preference [continued next page]

not willing to elevate this general circumstance to the level of a special circumstance.

In finding to the contrary in the instant case, the district court relied on Fortson v. Dorsey, 379 U.S. 433 (1965), and Chapman v. Meier, supra, as support for the proposition that provision of city-wide representation could serve as a justification for at-large districts in court imposed remedial plans. See 399 F. Supp. at 795 (A. 142). The district court's reliance on Fortson is misplaced. Fortson did not involve a successful challenge to the constitutionality of an at-large election scheme. Rather, it was an unsuccessful challenge to a Georgia redistricting scheme, which included multimember districts, based on the 1960 census. The primary issue in Fortson was whether multimember districts violated the one person-one vote principle, not whether they unconstitutionally diluted minority voting

for single-member districts. Wallace v. House, 538 F.2d 1138 (5th Cir. 1976), cert. denied 53. L.Ed.2d 1060 (1977).

strength.[39] The sole reference to a district wide perspective in Chapman, 420 U.S. at 42 n. 14, states that representation of city-wide or region-wide views may be a conceivable rationale supporting multimember districts. This statement alone does not support the elevation of city-wide perspective to the status of a special circumstance.

The record in this case does not justify recognition of city-wide perspective as a special circumstance. There has been no showing that there is any unique or compelling need in Dallas to have a city-wide perspective represented on the Council, or that such perspective would be insured by the election of three council members at-large. On the contrary, the unique role played by C.C.A. might tend to make the three at-large representatives reflect a narrower perspective, rather than

[39] Similarly, petitioners' reliance on Dusch v. Davis, 387 U.S. 112 (1967), and Dallas County, Alabama v. Reeves, 421 U.S. 477 (1975), in support of the same principle is inappropriate. These cases, like Fortson, supra, uphold the constitutionality of multimember schemes challenged as violating the one person-one vote rule and do not involve fashioning remedies after a finding that the multimember scheme is unconstitutional.

a broader one.[40] Although there was some testimony that decisions on zoning, redevelopment and other matters require a perspective going beyond the boundaries of a particular neighborhood (see A. 141), there is no evidence that council members elected from single-member districts would be unable or unwilling to consider such matters fairly. It is unlikely that council members elected from single-member districts containing approximately 80,000 people each would be unduly parochial in their views.[41]

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[40] The greater expense of city-wide campaigning and the greater problems of candidate recognition in a city-wide district make C.C.A. support critical and make localized candidate efforts to overcome lack of C.C.A. endorsement more difficult. For these reasons, successful at-large candidates may well be beholden to C.C.A. and its perspective, rather than that of some 80,000 residents of a single-member district.

[41] The size of districts in Dallas significantly undermines any argument that representatives from single-member districts would respond to narrow interests. In the other cases in which this Court expressed preference for single-member districts, the districts were considerably smaller. See, e.g., Wallace v. House, 425 U.S. 947 (1976) (Ferriday, Louisiana, five districts for population 5,200); East Carroll Parish School Board v. Marshall, supra (East Carroll Parish, Louisiana, [continued next page]

CONCLUSION

In granting a redistricting remedy for unconstitutional dilution of minority voting rights, single-member district remedial plans should be utilized in the absence of special circumstances requiring at-large districts. No such circumstances exist in this case. The judgment of the Court of Appeals should therefore be affirmed.

DATED: March 28, 1978.

Respectfully submitted,

VILMA S. MARTINEZ
MORRIS J. BALLER
LINDA HANTEN
JOAQUIN G. AVILA
GEORGE SOLARES

Attorneys for Respondents
Callejo, et al.

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seven districts for population 12,884); Connor v. Johnson, supra, (Mississippi legislature statewide; largest county, Hinds, had five Senate districts and twelve House districts for population 214,973, see 402 U.S. at 691 and Connor v. Finch, supra, 52 L.Ed.2d at 479).